IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. [redacted] 7

ROLLA W. COLEMAN, W. A. HERRON, CLAUDE C. SHADDEN, ET AL.,
Petitioners,

v.

CLARENCE W. MILLER, AS SECRETARY OF THE SENATE OF THE STATE OF KANSAS, ET AL.,
Respondents.

MEMORANDUM BRIEF ON JURISDICTION.

ROBERT STONE,
JAMES A. McCLURE,
ROBERT L. WEBB,
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[illegible] PRINTING CO., TOPEKA

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PETITIONERS,

vs.

CLARENCE W. MILLER, AS SECRETARY OF THE SENATE OF THE STATE OF KANSAS, ET AL.,
RESPONDENTS.

MEMORANDUM BRIEF ON JURISDICTION.

Mr. Justice Frankfurter on the bench asked me to reconcile this case with *Fairchild v. Hughes.* We regret our inability to do so in oral argument, but the case of *Leser v. Garnett,* decided the same day and reported in the same volume with *Fairchild v. Hughes,* is such a complete answer that it seems as though I must have misunderstood the purport of the question.

The Kansas case was started as an original action in the Supreme Court of the state by thirty-one senators and three members of the House then in session. In

addition to that, the Senate passed a resolution instructing the Attorney-General to enter appearance for the state of Kansas in the suit, and under a court order that was done. The question of jurisdiction was raised by the state court and the Supreme Court of Kansas decided that it had jurisdiction. This decision brings it squarely within *Leser v. Garnett* so far as jurisdiction of the parties is concerned and the right of the parties to bring suit. But our case is much stronger than Leser v. Garnett for the following reasons. In the *Leser* case the plaintiffs were simply citizens and voters. In the Kansas case the plaintiffs have a peculiar interest in the law suit aside from the fact that they are citizens and voters. They are members of the legislature which passed upon the resolution to ratify. They have a peculiar interest in having their action made effectual. By casting twenty votes against the resolution, they defeated it, unless the Lieutenant Governor had a right to vote. Two of their number voted on the original resolution in 1925, rejecting it. Those two at least had an interest in making that action of rejection effectual. In addition to this, the state is a party to the litigation and all of the people of the state are interested, and this was done under the instructions of the plaintiffs in this case. So far as the right of the parties to maintain the suit in the state court is concerned, it is definitely settled and that brings us squarely within the rule of *Leser v. Garnett*. This is so evident that it seems I must have misunderstood the

real purport of the question. Perhaps the question intended to include the argument made by the Solicitor General on Tuesday, when he suggested that the action was premature.

As we have already argued in our brief the question is justiciable because the deliberative action of the legislature was at an end and only the ministerial act of certification remained. The question is not whether the legislature should as a political measure ratify the amendment or reject it. The question pure and simple is whether or not the action already taken by the legislature is valid. This controversy involves the construction of Art. 5 of the Constitution; the meaning of the word "legislature". It involves the question of whether or not a rejection once made is binding or can be rescinded by a subsequent legislature. It involves the question of whether or not more than one-fourth of the legislatures of the respective states having rejected an amendment by definite and positive action and not mere inaction, the amendment is thereby defeated. It involves the question of whether or not Art. 5 implies that an amendment proposed by the Congress shall be acted upon presently or may be delayed for a century or more before action is taken; whether under all the circumstances in this case the proposal to amend has not lapsed by reason of the expiration of a reasonable time. Those questions are all judicial questions and not legislative or political questions. They do not involve in any way the deliberative

machinery of the government, but they review action of the legislature already taken. That a controversy has arisen is evident. If it follows and does not interrupt the legislative action or the action of a deliberative assembly, but only seeks to pass upon the validity of said action, then it is not political but judicial. While the action of the legislature in passing upon a proposed amendment is not strictly legislative, still it partakes of the same character and a definition of judicial as compared with legislative action would seem to be applicable to the situation at bar. This court, by Justice Brewer, many years ago defined and distinguished legislative from judicial action as follows:

> "It is one thing to inquire whether the rates which have been charged and collected are reasonable;—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future;—that is a legislative act."
>
> *Interstate Commerce Comm. v. Cincinnati*, N. O. & T. P. R. R. Co., 187 U. S. 479, 42 L. ed. 243.

We suggest that the same definition and differentiation is applicable to the case at bar. The deliberation of the legislature in determining whether or not the proposed amendment shall be ratified is a semi-legislative function. But an inquiry as to whether the thing done was a ratification, was validly done, or whether the matter could be properly considered at the time, is a judicial function.

The controversy is justiciable.

Respectfully submitted,

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